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ALEXANDER L. STEVAS,
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No. 83-483

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

HYDROCULTURE, INC.

Petitioner,

VS.

COOPERS AND LYBRAND,

Respondent.

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

- I. Whether the court of appeals erred in affirming the bankruptcy judge's finding that on the facts of this case an unliquidated counterclaim filed by the debtor (Petitioner) against a creditor (Respondent) could not be liquidated or estimated without unduly delaying the administration of the debtor's estate and, therefore, should not be adjudicated by the bankruptcy court.

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STATUTES INVOLVED

Respondent believes that, in addition to Bankruptcy Act of 1898 § 57d, 11 U.S.C. § 93(d), set forth in Appendix E to the Petition, consideration of the following statutory provision is necessary:

Bankruptcy Act of 1898 § 63d, 11 U.S.C. § 103(d)

d. Where any contingent or unliquidated claim has been proved, but, as provided in subdivision d of section 57 of this Act, has not been allowed, such claim shall not be deemed provable under this Act.

STATEMENT OF THE CASE

Petitioner, Hydroculture, Inc., filed a voluntary petition for arrangement pursuant to Chapter XI of the Bankruptcy Act of 1898 in February, 1975. Respondent, the public accounting firm of Coopers & Lybrand, filed a claim as a creditor of Hydroculture seeking monies for professional services rendered in connection with the examination of the financial statements of Hydroculture.

Hydroculture objected to the allowance of the claim filed by Coopers & Lybrand and affirmatively sought relief for an unspecified sum in damages against Coopers & Lybrand alleging that Coopers & Lybrand "negligently and carelessly required Hydroculture to change the accounting treatment" of income derived from the sale and lease back of hydroponic vegetable growing units.

Coopers & Lybrand moved to dismiss the tort counterclaim on the ground that the bankruptcy court lacked jurisdiction because the counterclaim was an unliquidated claim which was neither a "provable" debt under Section 63 (11 U.S.C. § 103) nor an "allowable" claim within the meaning of Section 57 (11 U.S.C. § 93) of the Bankruptcy Act of 1898.¹

The bankruptcy judge dismissed the counterclaim for the reason that the claim was neither provable nor allowable since it was not capable of liquidation or estimation.

¹The Bankruptcy Reform Act of 1978, Pub.L.No. 95-598, 92 Stat. 2549 (1978), superseded the Bankruptcy Act of 1898, 11 U.S.C. § 1 et seq. (as amended) in its entirety. Cases such as the present one, commenced prior to October 1, 1979 are still governed by the 1898 Act. Pub.L.No. 95-598, § 408(a), 92 Stat. 2683 (1978). Accordingly, all citations herein are to the United States Code codification of the 1898 Act.

In addition, the judge denied Hydroculture's request for leave to file an amended pleading containing similar allegations, but characterizing the claim as a breach of contract. Hydroculture appealed to the district court from the bankruptcy court's order of dismissal and denial of leave to amend.

The district court found that the bankruptcy judge had not abused his discretion either by ruling that Hydroculture's claim was not capable of liquidation or estimation or by denying leave to file an amended pleading. Hydroculture filed a timely appeal with the Ninth Circuit.

During the pendency of the proceedings, Hydroculture filed and served a separate action against Coopers & Lybrand in Arizona state court alleging the same facts and seeking the same damages as sought in Hydroculture's bankruptcy pleadings. The state court action is pending at this time.

The Court of Appeals for the Ninth Circuit found that the bankruptcy judge "acted within [his] discretion in finding that liquidation or estimation of [Hydroculture's] counterclaim would unduly delay the administration of the estate." The court of appeals further held that the bankruptcy court's denial of leave to amend the complaint was not improper because Hydroculture's claim, even if characterized as a contract action, still would have been incapable of liquidation or estimation without undue delay. Finally, the court of appeals concluded that equitable considerations did not require a different result.

Hydroculture filed a timely Petition for a Writ of Certiorari from the Ninth Circuit Court of Appeals' decision.

SUMMARY OF ARGUMENT

When Coopers & Lybrand filed a claim against Hydroculture for payment for professional services rendered, Hydroculture filed a counterclaim for an unspecified sum, which Coopers & Lybrand moved to dismiss for lack of jurisdiction. The bankruptcy judge, affirmed by the district court and the court of appeals, concluded that Hydroculture's counterclaim should not be adjudicated in the bankruptcy court because it was not liquidated, and liquidation or estimation of the counterclaim would unduly delay administration of the estate. The decision leaves Hydroculture to pursue its pending claim (which arises under state law and affords no independent basis for federal jurisdiction) in the state courts. The decision is plainly correct and presents no justification for this Court's review.

Under the provisions of the Bankruptcy Act of 1898 governing this case, the bankruptcy court was required to decline to exercise jurisdiction over Hydroculture's counterclaim if the counterclaim was not liquidated or capable of liquidation or of reasonable estimation without unduly delaying administration of the estate. The decision of the bankruptcy judge that liquidation or estimation of Hydroculture's counterclaim for an unspecified sum would unduly delay estate administration was properly affirmed by the district court and the court of appeals, regardless of the standard of review applied. Furthermore, the decision presents no issue that warrants this Court's review since the decision merely applies settled law to the facts of this particular case, and the governing statutes have, in any event, been superseded for bankruptcy cases commenced after October 1, 1979.

ARGUMENT**I****THE NINTH CIRCUIT'S DECISION PRESENTS NO COMPELLING FEDERAL QUESTIONS**

Petitioner's argument that the Ninth Circuit "has decided an important question of federal law which has not been, but should be, settled by this Court" is without foundation, and the sole fact that a given question has not been resolved by the Supreme Court has never been a recognized basis for the exercise of certiorari jurisdiction.

Additionally, the unlikely prospect of the issues presented herein arising in other pending bankruptcy cases controlled by the Bankruptcy Act of 1898 similarly weighs against review of the decision by this Court. The Bankruptcy Act of 1898 was superseded in its entirety by the Bankruptcy Reform Act of 1978, Pub.L. No. 95-598, 92 Stat. 2549 (1978). Only those few cases commenced prior to October 1, 1979, and still pending, are governed by the 1898 Act. Pub.L. No. 95-598, § 408(a), 92 Stat. 2683 (1978). Thus, there is no real likelihood that the issues presented herein will reoccur.

Furthermore, there is no conflict between the various federal courts on the issues advanced by Petitioner in this proceeding, and there is little possibility that the issues postulated by Petitioner will give rise to a conflict among the federal judiciary. Since the Bankruptcy Act of 1898 has been superseded, and in light of the current uncertainty regarding the authority of bankruptcy judges, a further review of the issues herein will not resolve any compelling questions of federal law. Accordingly, the issues in the present case do not warrant review by the Supreme Court on a grant of certiorari.

II

**THE NINTH CIRCUIT'S DECISION IS IN ACCORD
WITH THE STANDARD OF REVIEW APPLICABLE
TO A BANKRUPTCY JUDGE'S FINDINGS REGARD-
ING THE PROVABILITY AND ALLOWABILITY OF
CLAIMS ARISING UNDER THE SUPERSEDED
BANKRUPTCY ACT OF 1898**

1. The abuse of discretion test applied by the district court to the bankruptcy judge's findings was proper and was the standard of review advocated on appeal by Petitioner

Petitioner asserts that the district judge erred in applying an "abuse of discretion" standard of review to the findings of the bankruptcy judge regarding the provability and allowability of Petitioner's malpractice claim. However, Petitioner urged the very same standard of review before the district court when it designated the following issue on appeal:

Did the Bankruptcy Court abuse its discretion in ruling that the claim of Hydroculture against Coopers & Lybrand is not provable in Bankruptcy Court pursuant to Section 57(d) of the Bankruptcy Act?

Petitioner thereafter restated that issue in its Opening Brief on appeal to the district court.

The courts and commentators are in agreement that the determination of whether a claim in bankruptcy is capable of liquidation and thus allowable under § 57(d) is a matter directed to the sound discretion of the bankruptcy court. *See, e.g.,* 1 Cowans, *Bankruptcy Law and Practice* § 198 (2d ed. 1978); 3 *Collier on Bankruptcy*, § 57.15 (14th

ed.); *Securities and Exchange Commission v. An-Car Oil Co.*, 604 F.2d 114, 121 (1st Cir. 1979).

In *In Re THC Financial Corp.*, 686 F.2d 799 (9th Cir. 1982), the Court of Appeals for the Ninth Circuit recognized the "abuse of discretion" standard when it reviewed a bankruptcy court's decision regarding provability and allowability of unliquidated claims:

This provision [57(d)] confers a broad power on the bankruptcy court to take steps necessary to liquidate or estimate claims, . . . and affords the court broad discretion in determining what constitutes "undue" delay or a "reasonable" estimation . . . (citations omitted).

Id. at 803. See also, *In Re Cartridge Television, Inc.*, 535 F.2d 1388, 1398 (2d Cir. 1976).

Respondent submits that the district court properly applied an "abuse of discretion" standard when reviewing the bankruptcy judge's determination that Hydroculture's unliquidated malpractice claim was not capable of liquidation or estimation. The district court expressly noted that it "did not previously and does not [now] find that the Bankruptcy Court abused its discretion in ruling that Hydroculture's counterclaim was not capable of liquidation or estimation. . . ."

The Court of Appeals for the Ninth Circuit agreed with the district court that "the Bankruptcy Judge acted within his discretion in finding that the liquidation or estimation of the counterclaim would unduly delay the administration of the estate." Consequently, this case is not one which requires the exercise of this Court's extraordinary certiorari jurisdiction.

2. Petitioner's unliquidated tort claim is neither provable nor allowable under the Bankruptcy Act since it is not capable of liquidation or estimation

Petitioner's tort claim must be a debt which must be "proved" pursuant to Section 63(a) and "allowed" under Section 57(d) as conditions precedent to the exercise of the bankruptcy court's subject matter jurisdiction.² Section 63(a) defines the nine classes of debts which may be "proved" in bankruptcy, and an unliquidated tort claim is not one such debt. Moreover, in any event, Section 57(d) provides that even a duly "proved" debt (one falling within the parameters of Section 63(a)) shall not be "allowed" if the court determines that it is not capable of liquidation or reasonable estimation, or that such liquidation or estimation would unduly delay the administration of the estate. Pursuant to Section 63(d), when a claim is "proved," but has not been "allowed" under Section 57(d), the claim is deemed not provable under the Bankruptcy Act. Consequently, practical difficulties in either liquidation or estimation of otherwise duly "proved" claims will result in the disallowance of such claims.

The language of Section 63(d) clearly illustrates that Section 57(d) cannot be avoided through a characterization of the same allegations of Hydroculture's counterclaim as a contingent contractual liability under Section 63(a)(4). As one noted commentator has written:

The limits of provability as to contingent contractual liabilities are now drawn exclusively from the angle

²As noted by Petitioner in footnote 6, p. 19, in its Petition, pursuant to Section 68 of the Bankruptcy Act of 1898, 11 U.S.C. 108, Sections 57 and 63 of the Act are applicable to counterclaims filed by the debtor against a creditor. *Pindel v. Holgate*, 221 F. 342 (9th Cir. 1915).

of practical feasibility as it appears to the bankruptcy court. *Insurmountable technical difficulties of liquidation alone will now take a contingent contractual claim out of the category of provable claims, or, more precisely, will with retroactive effect strip it of its natural status as a provable claim.*

3A *Collier on Bankruptcy*, § 63.23 (14th Ed. 1975) (Footnote omitted and emphasis added). Nor is it sufficient to contend that the bankruptcy court should have directed a time and manner by which Hydroculture's claim could have been liquidated or estimated. The bankruptcy court may determine that a claim is not capable of liquidation or estimation without being required to provide a manner and time for liquidation or estimation of the claim:

Under 57(d) a contingent or otherwise unliquidated claim must be disallowed (1) if it has not been liquidated or estimated as to its amount "in the manner and within the time directed by the court"; or (2) *if the court determines that the claim "is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act"*.

3 *Collier on Bankruptcy* § 57.15[4]. (Emphasis added). Thus, the bankruptcy court has the discretion to properly disallow a claim without directing a time and manner of liquidation if the practical difficulties of liquidation or estimation would unduly delay administration of the estate.

In the present case, liquidating or estimating a malpractice claim would have involved complex issues of fact and law. Adjudicating Petitioner's claim would require extensive discovery followed by a full factual trial. Attempting to adjudicate such a claim would disrupt the due admin-

istration of the bankruptcy court and frustrate its specific purpose of efficiently discharging a bankrupt's debt while preserving the rights of creditors. The bankruptcy court properly exercised its discretion when it determined that Hydroculture's claim was not capable of liquidation or estimation.

III

THE NINTH CIRCUIT'S DECISION PROPERLY RECOGNIZED THAT EQUITY DID NOT REQUIRE REVERSING THE BANKRUPTCY COURT

The Petitioner, in its Conclusion, posits an issue which it has not asked this Court to review when it suggests that the ultimate question before this Court is whether Hydroculture is entitled to a forum to pursue its claim against Coopers & Lybrand on the merits. The issue before this Court is whether the bankruptcy judge erred in finding that on the facts of this case Hydroculture's tort counterclaim could not be liquidated or estimated without unduly delaying the administration of the estate. Equitable principles neither mandate that Hydroculture be permitted to proceed against Coopers & Lybrand in bankruptcy court nor do they enlarge the jurisdiction of the bankruptcy court.

Petitioner is now proceeding against Respondent in the state courts of Arizona on an action filed in 1981, more than five years after the filing of the original claim in bankruptcy. Coopers & Lybrand moved for summary judgment in the state court action on the ground that it was barred by the applicable state statutes of limitation. The state court held that the statute of limitations on Hydroculture's claim was tolled by the filing in

bankruptcy. There is, therefore, a state court malpractice action against Respondent proceeding at this time.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PETITIONER LEAVE TO AMEND TO PLEAD BREACH OF CONTRACT BECAUSE AMENDMENT WOULD NOT HAVE CURED THE DEFECT

Hydroculture's contention that the district court abused its discretion in denying leave to amend to plead a breach of contract action ignores the futility of such a pleading. The court of appeals clearly recognized as did the lower courts, that Hydroculture's proposed breach of contract claim was no more susceptible to liquidation or estimation without undue delay than the tort claim. Since courts are not required to engage in futile gestures, the denial of leave to amend the counterclaim was proper and within the sound discretion of the bankruptcy court.

CONCLUSION

Respondent respectfully requests that the Supreme Court deny the Petition for a Writ of Certiorari.

Respectfully Submitted this 19th day of October, 1983.

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